Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

KAREN LECLERC, ET AL.,

Petitioners,

v.

DANIEL E. WEBB, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Louisiana has adopted a rule that excludes nonimmigrant aliens (aliens lawfully residing in the U.S. who do not hold permanent resident visas) from admission to the Louisiana Bar. That exclusion does not apply to immigrant aliens (aliens residing in the U.S. who hold permanent resident visas). A divided Fifth Circuit panel upheld the rule against an equal protection challenge after rejecting strict scrutiny in favor of the rational basis test. The Fifth Circuit also rejected a preemption challenge to the rule. It subsequently denied rehearing en banc by an 8-7 vote.

The questions presented are as follows:

1. Whether a burden imposed solely on nonimmigrant aliens lawfully residing in the United States, such as the Louisiana rule precluding such persons from Bar admission, is subject to strict scrutiny under the Equal Protection Clause, a question on which this Court granted certiorari but failed to reach in *Toll* v. *Moreno*, 458 U.S. 1 (1982), and which remains the subject of conflicting appellate decisions.

2. Whether the Louisiana rule excluding lawfully admitted nonimmigrant aliens from Bar admission is preempted by federal immigration law and policy.

RULE 14.1 STATEMENT

Petitioners (plaintiffs-appellants and cross-appellees below) are Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen D. Affleck.

Respondents (defendants-appellees and cross-appellants below) are Daniel E. Webb and Harry J. Phillips, in their capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions, respectively, and Jeffery P. Victory, Jeanette Theriot Knoll, Chet D. Traylor, Catherine D. Kimball a/k/a Kitty Kimball, John L. Weimer, and Bernette Joshua Johnson, in their official capacities as Justices of the Louisiana Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen D. Affleck respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 419 F.3d 405. The order of the court of appeals denying petitioners' petition for rehearing en banc (App., *infra*, 85a-89a), including the two opinions dissenting therefrom, are reported at 444 F.3d 428. The opinion of the district court (App., *infra*, 43a-84a) is reported at 270 F. Supp. 2d 779.

The Fifth Circuit consolidated this case on appeal with *Wallace* v. *Calogero*. The opinion of the district court in *Wallace* is reported at 286 F. Supp. 2d 748 (E.D. La. 2003). The *Wallace* plaintiffs are filing a separate petition for certiorari. Petitioners respectfully request that the two petitions be considered together.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2005. Petitioners' timely petition for rehearing en banc was denied on March 27, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Constitution provides: "nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Supremacy Clause of the Constitution provides, in relevant part: "This Constitution, and the Laws of the United

States * * *, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

STATEMENT

Introduction. This case raises two important issues of federal law—whether a state classification that disadvantages lawfully admitted nonimmigrant aliens is subject to strict scrutiny and whether a state's refusal to admit lawfully admitted nonimmigrant aliens to the state Bar conflicts with the federal authority over immigration. By answering these questions in the negative, the Fifth Circuit created conflicts with other courts and departed from this Court's precedents.

Louisiana prohibits lawfully admitted nonimmigrant aliens from admission to the state Bar, limiting Bar admission to citizens and immigrant aliens.[1] As a result, foreign nationals with law degrees from U.S. or foreign law schools who lawfully reside in Louisiana for many years under non-permanent visa classifications may not practice law in Louisiana even if they are otherwise eligible to do so. A divided Fifth Circuit rejected an equal protection challenge to the Louisiana rule, holding that it was subject only to rational basis rather than strict scrutiny review because "the level of constitutional protection afforded nonimmigrant aliens is different from that possessed by permanent resident aliens." App., *infra*, 2a. The court of appeals also rejected a Supremacy Clause challenge to the Louisiana rule, finding no conflict between federal authorization for nonimmigrant

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[1]An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Nonimmigrant aliens are lawfully admitted aliens who fall within one of the categories listed in 8 U.S.C. § 1101(a)(15). Immigrant aliens are all other lawfully admitted aliens. *Ibid.*; see *Elkins* v. *Moreno*, 435 U.S. 647, 664 (1978).

aliens to reside in this country and a state's refusal to allow nonimmigrant aliens to practice law. Seven judges dissented from denial of rehearing en banc, with Judge Higginbotham and Judge Stewart each authoring dissenting opinions.

The Fifth Circuit decision conflicts with those of other courts. As described below, the Fourth Circuit has held that a state classification that disadvantaged only nonimmigrant aliens was subject to strict scrutiny and violated the Equal Protection Clause of the Fourteenth Amendment. *Moreno* v. *University of Md.*, 645 F.2d 217, 220 (4th Cir. 1981), aff'd on other grounds, *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982). In addition, as further described below, the Supreme Court of Vermont held that a Vermont rule prohibiting nonimmigrant aliens from admission to the state Bar, a rule virtually identical to the Louisiana rule at issue here, violated the Supremacy Clause of Article VI. *Dingemans* v. *Board of Bar Examiners*, 568 A.2d 354, 357 (Vt. 1989).

The Fifth Circuit decision also is inconsistent with this Court's precedents. With respect to equal protection, the Court has repeatedly held that strict scrutiny applies to state alienage classifications. Applying that standard, it has struck down state regulations forbidding aliens to practice law (*In re Griffiths*, 413 U.S. 717 (1973)) and civil engineering (*Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572 (1976)), denying aliens financial assistance for higher education (*Nyquist* v. *Mauclet*, 432 U.S. 1 (1977)), and denying welfare benefits to aliens not meeting a residency requirement (*Graham* v. *Richardson*, 403 U.S. 365 (1971)). As for preemption, the Court repeatedly has protected "the preeminent role of the Federal Government with respect to the regulation of aliens within our borders" (*Toll* v. *Moreno*, 458 U.S. 1, 10 (1982)) and struck down state laws that "impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States." *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). As particularly relevant here, the Court in *Toll*

held that a state's denial of benefits to lawfully admitted nonimmigrant aliens, which were available to both citizens and immigrant aliens, was preempted by federal immigration law. 458 U.S. at 14-16.

The Court should resolve these conflicts, reject the Fifth Circuit's self-declared "nonimmigrant" exception to this Court's precedents requiring strict scrutiny of state discrimination against lawfully admitted aliens, and hold that Louisiana's bar on the practice of law by lawfully admitted nonimmigrant aliens violates both the Equal Protection and Supremacy clauses of the U.S. Constitution.

Factual Background. Louisiana Supreme Court Rule XVII § 3(B) ("§ 3(B)") requires that "[e]very applicant for admission to the Bar of this state shall * * * [b]e a citizen of the United States or a resident alien thereof." Prior to 2002, the Louisiana Supreme Court had interpreted the term "resident alien" to include all foreign nationals "lawfully within the United States." *E.g.*, *In re Appert*, 444 So.2d 1208 (La. 1984). In 2002, the court changed course and defined "resident alien" as aliens "who have attained permanent resident status in the United States," thereby excluding aliens lawfully residing in this country on a nonimmigrant visa. *In re Bourke*, 819 So.2d 1020, 1022 (La. 2002). As a result, nonimmigrant aliens, including petitioners, are ineligible for admission to the state Bar, notwithstanding that they otherwise qualify for admission.

Petitioners Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck are nonimmigrant aliens with degrees from foreign law schools. Under federal law, each is entitled to work temporarily in the United States. In addition, each would be qualified to seek admission to the Louisiana Bar were it not for their nonimmigrant status. Leclerc, Jarry, and Boulord are French citizens who were admitted to the U.S. on J-1 student visas. Boulord now holds an H-1B temporary worker visa. Affleck is a Canadian citizen

admitted to the U.S. on an L-2 spousal visa who has been issued an employment authorization document by the Department of Homeland Security.[2] Louisiana Supreme Court Rule XVII § 6(A) authorizes graduates of foreign law schools to obtain admission to the Bar if their education and training are "equivalent" to graduates of accredited U.S. law schools. Affleck applied for such an equivalency determination but was refused due solely to her nonimmigrant status. App., *infra*, 4a-5a. The other petitioners then decided not to file their planned applications which, as the district court found, would have been futile. *Id.* at 54a-55a.

In March 2003, petitioners sued members of the Louisiana Supreme Court and the Louisiana Committee on Bar Admissions (collectively the "State officials") in their

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[2]A J-1 student visa is available to "an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill * * * who is coming temporarily to the United States * * * for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training." 8 U.S.C. § 1101(a)(15)(J). An L-2 spousal visa is available to an alien spouse of an "alien who, within 3 years preceding the time of his application * * *, has been employed continuously for one year by a firm * * * and who seeks to enter the United States temporarily in order to continue to render his services to the same employer * * * in a capacity that is managerial, executive, or involves specialized knowledge." *Id.* § 1101(a)(15)(L). An H-1B temporary work visa is available to an alien "who is coming temporarily to the United States to perform services * * * in a specialty occupation." *Id.* § 1101(a)(15)(H)(i)(b). An employment authorization document authorizes a nonimmigrant alien "to be employed in the United States without restrictions as to location or type of employment." 8 C.F.R. § 27a.12(a).

official capacities pursuant to 42 U.S.C. § 1983, alleging, *inter alia*, violations of the Equal Protection Clause of the Fourteenth Amendment and the Supremacy Clause of Article VI. App., *infra*, 5a.

Proceedings Below. The district court granted the State officials' motion to dismiss and denied petitioners' motion for summary judgment. According to the court, this Court has applied strict scrutiny only in cases involving permanent resident aliens, and it concluded that nonimmigrant aliens differ from citizens and permanent resident aliens in that their admission is temporary and for a limited purpose. App., *infra*, 73a. It therefore applied a rational basis standard, upholding § 3(B) on the ground that legal representation by aliens holding non-permanent visas would be subject to disruption if the lawyer left the country. *Id.* at 75a-76a. The court also rejected petitioners' preemption claim on the ground that § 3(B) does not specifically conflict with federal immigration law or Congressional policy. *Id.* at 78a-79a.

A different result was reached in a virtually identical case brought by other nonimmigrant aliens. In *Wallace* v. *Calogero*, 286 F. Supp. 2d 748, 762-764 (E.D. La. 2003), a different district court judge granted summary judgment to the plaintiffs on their equal protection challenge to § 3(B). Construing this Court's precedents, in particular the analogous *Griffiths* case, the *Wallace* court held that "the justification for applying strict scrutiny to immigrant resident aliens applies as forcefully to nonimmigrant resident aliens." *Id.* at 762-763. Applying strict scrutiny, the court concluded that § 3(b) was not the least restrictive means to achieve a compelling state interest because "[n]onimmigrant aliens as a class are not necessarily more transient than other groups," and the Louisiana rule excludes only "a fraction of persons who may have temporary residence in the state." *Id.* at 763.

The Fifth Circuit consolidated the two cases for appeal. While recognizing "some ambiguity in Supreme Court

precedent," the court held that "nonimmigrant aliens are not a suspect class" and that classifications disadvantaging them are not subject to strict scrutiny. App., *infra*, 12a-21a. It opined that this Court's precedents, including *Griffiths*, addressed "only state laws affecting permanent resident aliens" and deemed the distinction between immigrant and nonimmigrant aliens "paramount," resting on the "temporary connection" of nonimmigrant aliens to this country and their "more constricted" status as compared to that of immigrant aliens. *Ibid.* The court therefore held that state discrimination claims by lawfully admitted nonimmigrant aliens are subject only to rational basis review. *Id.* at 21a. It concluded that § 3(B) bears a rational relationship to legitimate state interests because it assures clients that licensed attorneys in Louisiana will provide "continuity and accountability in legal representation." *Id.* at 23a.

The Fifth Circuit also held that § 3(B) is not preempted by federal law. It opined that Louisiana's denial of Bar admission to lawfully admitted nonimmigrant aliens is "in accord, rather than conflict, with federal regulation of alien employment" because it "affects a class of persons whom Congress has expressly prohibited from living or working permanently in the United States." *Id.* at 31a-32a.

Judge Stewart dissented from the panel's equal protection ruling. He noted that this Court has not distinguished between lawfully admitted immigrant and nonimmigrant aliens when applying strict scrutiny to state alienage classifications. App., *infra*, 36a. He would have struck down § 3(b) because aliens are a suspect class, nonimmigrant aliens are "part of that class," and § 3(b) "is directed at aliens and only aliens are harmed by it." *Id.* at 34a.

The Fifth Circuit subsequently denied petitioners' request for rehearing en banc by a vote of 8 to 7. *Id.* at 85a. There were two dissenting opinions.

Judge Higginbotham, writing for all seven dissenting judges, criticized the panel majority for "judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship," a step "not sanctioned by Supreme Court precedent." App., *infra*, 87a. He recognized widespread opposition to classifying aliens as an insular minority either because "the unique federal interest in regulating aliens offers a superior rationale for strict scrutiny than the aliens' insular status" or because "the insular status of aliens exists only as a consequence of valid federal law," but explained that this Court has rejected each of those arguments. *Id.* at 87a-88a. Judge Higginbotham criticized the panel majority's silence with regard to the "trumping constitutional power of the federal government in controlling * * * matters of immigration," which "the Supreme Court has pointed to as itself demanding strict scrutiny of state regulations of persons whose presence in the country is lawful under federal law." *Id.* at 88a-89a. By deeming strict scrutiny inappropriate for aliens lawfully admitted with a limited tenure, the panel majority, according to Judge Higginbotham, "relaxes scrutiny of state regulation of aliens as the federal regulation of them is increased" and "shifts responsibility from the Congress to the States," a "perverse" result that he called "exactly backwards." *Id.* at 88a.

Judge Stewart, in addition to signing on to Judge Higginbotham's dissent, penned an additional dissent of his own, joined by four other judges. He reprised his reasons for dissenting from the panel majority decision and stressed "the far reaching consequences of the panel's holding." App., *infra*, 89a.

REASONS FOR GRANTING THE PETITION

The Court's review is required to resolve conflicts among the lower courts over the proper level of scrutiny accorded to claims of state discrimination against nonimmigrant aliens

and over federal preemption of state rules precluding nonimmigrant aliens from Bar admission. The ruling below circumvented this Court's precedents by creating a "nonimmigrant" exception to the longstanding requirement that state alienage classifications be scrutinized strictly. Such an exception would have a severe impact on nonimmigrant aliens residing lawfully in this country and would interfere with the federal government's supreme authority over immigration and aliens. The proper standard on challenges to state alienage classifications has been a subject of intense debate within the Court for decades, leading to numerous and in some cases passionate dissents.[3] This case provides an ideal opportunity to clarify any "ambiguity" in this Court's precedents (App., *infra*, 12a) and to provide guidance to the lower courts on the proper standards when reviewing state alienage classifications.

I. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THE FOURTH CIRCUIT AND STATE COURTS OF LAST RESORT.

A. The Fifth Circuit Has Created A Conflict Over The Proper Level Of Scrutiny When A State Discriminates Against Nonimmigrant Aliens.

The Fifth Circuit's decision in this case creates a conflict with a decision of the Fourth Circuit over the proper level of scrutiny on equal protection challenges to discrimination against nonimmigrants.

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[3]See *Toll* v. *Moreno*, 458 U.S. 1, 44-47 (1982) (O'Connor & Rehnquist, JJ., separately dissenting); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (Burger, Powell, & Rehnquist, JJ., separately dissenting); *Elkins* v. *Moreno*, 435 U.S. 647 (1978) (Rehnquist, J., dissenting); *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572 (1976) (Rehnquist, J., dissenting); *In re Griffiths*, 413 U.S. 717 (1973) (Burger, J., dissenting); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (Rehnquist, J., dissenting).

In *Moreno* v. *University of Md.*, 645 F.2d 217 (4th Cir. 1981), the Fourth Circuit held that a state university's policy of denying in-state status to "nonimmigrant aliens," which required them to pay higher tuition and fees than citizens and immigrant aliens, was subject to strict scrutiny and violated the Equal Protection Clause. *Id.* at 220. The court also affirmed the district court's ruling that the state policy was preempted under the Supremacy Clause because it "constituted state interference with the federal prerogative over immigration." *Ibid.* This Court granted certiorari on both questions and affirmed on the preemption ground without reaching the equal protection ground. *Toll* v. *Moreno*, 458 U.S. 1, 9-10 (1982). Therefore, it remains the law in the Fourth Circuit that nonimmigrant aliens, such as the *Moreno/Toll* plaintiffs and petitioners here, are within a suspect class entitled to strict scrutiny when challenging state regulations that discriminate against nonimmigrant aliens. See *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (explaining that court of appeals' prior holding remained viable after Supreme Court affirmed on alternative ground). Federal district courts also are divided over this question. Compare *Tayyari* v. *New Mexico State Univ.*, 495 F. Supp. 1365, 1372-1373 (D.N.M. 1980) (state discrimination against nonimmigrant aliens is subject to strict scrutiny), with *Ahmed* v. *University of Toledo*, 664 F. Supp. 282, 286 (N.D. Ohio 1986) (state discrimination against nonimmigrant aliens is not subject to strict scrutiny), appeal dismissed as moot, 822 F.2d 26 (6th Cir. 1987).

As further evidenced by the division between the district court in this case and the district court in *Wallace*, and by the 8-7 division within the Fifth Circuit, this Court's guidance is needed to clarify the proper level of scrutiny into claims of state discrimination against nonimmigrants. This case presents an excellent opportunity to resolve the strict scrutiny issue that the Court found unnecessary to reach in *Toll*.

B. The Fifth Circuit Has Created A Conflict Over Whether Federal Law Preempts State Rules Precluding Nonimmigrant Aliens From Bar Admission.

The Fifth Circuit's decision directly conflicts with the ruling of a state court of last resort over whether a state rule denying Bar admission to qualified nonimmigrant aliens is preempted by federal immigration law.

In *Dingemans* v. *Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989), the Supreme Court of Vermont addressed a Vermont rule that, like the Louisiana rule at issue here, required that Bar admission applicants be either a citizen or "an alien who has been lawfully admitted to the United States for permanent residence." *Id.* at 354. The plaintiff was a Dutch lawyer residing temporarily in the U.S. on an H-1 visa. *Id.* at 355. The court noted that "the federal immigration program contemplates that a nonresident immigrant attorney may engage in the practice of law in this country," the plaintiff would have been entitled to admission to the Vermont Bar if not for the state restriction, and the scope of her visa was a matter "to be resolved strictly between herself and the federal government." *Id.* at 356. The court concluded that the state rule "imposes a burden on the federal immigration program that could not have been intended by the Congress" and was therefore preempted pursuant to the Supremacy Clause. *Id.* at 357.

Another state court of last resort reached a similar conclusion in analogous circumstances. In *Alaska Dept. of Revenue* v. *Andrade*, 23 P.3d 58, 61 (Alaska 2001), the Supreme Court of Alaska addressed a state statute that limited alien eligibility for a state benefit to those "lawfully admitted for permanent residence in the United States." Applying this Court's *Toll* decision, the court explained that "a restriction that categorically excluded nonrestricted nonimmigrants from [benefit] eligibility would be

unconstitutional." *Id.* at 74. The court held that the challenged statute was not preempted only because the state defined "lawfully admitted for permanent residence" to comprise nonimmigrant aliens who were not precluded from forming the intent to remain indefinitely, obviating any conflict with federal immigration law. *Id.* at 76. The court noted, however, that an implementing regulation that was in place when the action commenced would have been preempted had it not been repealed because it proscribed all nonimmigrant aliens lawfully admitted under federal immigration law from eligibility for the benefit. *Id.* at 78.

The Fifth Circuit's ruling conflicts with these decisions. This Court's review is required both to resolve these conflicts and to provide guidance to the lower courts on important issues of federal law.

II. THE FIFTH CIRCUIT'S RULING CONFLICTS WITH DECISIONS OF THIS COURT AND SHOULD BE REVERSED.

A. The Fifth Circuit's Ruling Conflicts With This Court's Equal Protection Precedents Requiring Strict Scrutiny Of State Alienage Classifications.

This Court has repeatedly held that "classifications based on alienage [are] inherently suspect and subject to close judicial scrutiny." *Graham*, 403 U.S. at 372; accord *Nyquist*, 432 U.S. at 7; *Flores de Otero*, 426 U.S. at 602; *Sugarman*, 413 U.S. at 642. As the Court explained in *Graham*, "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom judicial solicitude is appropriate." 403 U.S. at 372.

The Court's alienage decisions requiring strict scrutiny have not relied on technical immigration classifications. Instead, the Court has drawn a line between *lawfully admitted* aliens and *illegal* aliens. Compare *Flores de Otero*, 426 U.S. at 602 (the Court's strict scrutiny decisions apply to

"lawfully admitted aliens"); *Takahashi*, 334 U.S. at 420 (equal protection extends to "all persons lawfully in this country"), with *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982) (rejecting claim "that 'illegal aliens' are a 'suspect class'" subject to strict scrutiny in part because "entry into the class is itself a crime"). Because nonimmigrant aliens (including petitioners) are lawfully present in this country, the Fifth Circuit should not have rejected strict scrutiny as the proper standard on claims of discrimination against nonimmigrants.

In particular, the Fifth Circuit should not have rejected the applicability of *In re Griffiths*, 413 U.S. 717 (1973), in which this Court held that a state ban on the practice of law by lawfully admitted aliens is subject to strict scrutiny and violates the Equal Protection Clause. Griffiths, a Dutch citizen residing in the U.S. with no intent to seek U.S. citizenship, challenged a Connecticut rule that prohibited alien attorneys from admission to the state Bar. Although she was a permanent resident alien, the Court's holding did not turn on that status. In fact, the term "immigrant alien" or "permanent resident alien" does not appear in *Griffiths*. Instead, the Court consistently used the term "resident alien" (*e.g.*, *id.* at 722-723), a category that "includes both immigrant and nonimmigrant aliens" who lawfully reside in the U.S. *Wallace*, 286 F. Supp. 2d at 762.[4]

The Court in *Griffiths* recognized that states have "a substantial interest in the qualifications of those admitted to

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[4]The term "resident alien" is not defined in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*. By its terms, it comprises both immigrant aliens, defined in the Act as aliens granted permanent residence in the U.S., and nonimmigrant aliens, defined in the Act as aliens granted temporary residence in the U.S. See 8 U.S.C. § 1101(a)(15). As Judge Stewart observed below, both immigrant and nonimmigrant aliens are "resident aliens" because both reside lawfully in the U.S. App., *infra*, 35a-36a.

the practice of law," but ruled that use of a "suspect classification" such as alienage is unnecessary to safeguard that interest. *Griffiths*, 413 U.S. at 725. Instead, states must gauge the fitness of a Bar applicant "on a case-by-case basis" and consistent with appropriate requirements to vindicate their professional standards, such as training, familiarity with state law, and oaths. *Id.* at 726-727. A similar case-by-case inquiry would be a more narrowly tailored way of determining whether a particular alien who does not enjoy permanent resident status is likely to be able to provide competent and stable representation to clients.[5]

The only distinction between the rule struck down in *Griffiths* and Louisiana's § 3(B) is that the latter applies only to a subclass of lawfully admitted aliens. But this Court has rejected justifications for discrimination that apply "only within the class of aliens." *Nyquist*, 432 U.S. at 8. The fact that a state law "is not an absolute bar does not mean that it does not discriminate against the class." *Id.* at 9; see also *id.* at 15 (Powell, J., dissenting) (recognizing that the state law struck down by the Court distinguished "between aliens who prefer to retain foreign citizenship and all others"); *Graham*, 403 U.S. at 367 (state law that denied welfare benefits only to aliens who resided in the U.S. for less than 15 years failed strict scrutiny test); *Takahashi*, 334 U.S. at 413 (striking down state law that banned only aliens "ineligible to citizenship" from obtaining a fishing license). Nor can strict scrutiny be denied on the ground that nonimmigrants chose

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[5]A "narrow exception" to strict scrutiny of alienage classifications, known as the "governmental function" or "political function" exception, applies to state burdens on voting, holding public office, and serving as law enforcement officers. *Bernal* v. *Fainter*, 467 U.S. 216, 220 (1984); *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979). The Court held in *Griffiths*, 413 U.S. at 728, that this exception does not apply to lawyers or bar admission rules; accord *Nyquist*, 432 U.S. at 11; *Flores de Otero*, 426 U.S. at 603.

that status. This Court rejected a similar argument in *Nyquist*, explaining that "the element of voluntariness in a resident alien's retention of alien status is a recognized element" in the Court's cases applying strict scrutiny to alienage classifications. 432 U.S. at 9 n.11 (citing cases).

The Fifth Circuit's ruling that § 3(B) is insulated from strict scrutiny because it discriminates against nonimmigrant aliens rather than immigrant aliens cannot be squared with the above precedent. The panel majority's attempt to limit this Court's alienage classification cases to those involving discrimination against permanent resident (*i.e.*, immigrant) aliens (App., *infra*, 13a) has no support in the Court's opinions, as both Judge Higginbotham and Judge Stewart explained in dissent. The decision below rests in part on a misquoted passage from *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978). According to the panel majority, *Foley* stated that "the state laws at issue in *Graham*, *Nyquist*, *de Otero*, and *Griffiths* warranted close judicial scrutiny because they took positions seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." App., *infra*, 15a (emphasis in original). In fact, the portion of that passage preceding "because" does not appear in *Foley*, and the Court said nothing in *Foley* that purports to establish a causal link between permanent residency status and the Court's requirement that strict scrutiny be applied to alienage classifications.

To be sure, immigrant aliens may in some sense be closer than nonimmigrant aliens to citizenship, but that has never been a criterion for strict scrutiny of alienage classifications. Lawfully admitted nonimmigrant aliens are similarly situated to immigrant aliens in all respects relevant to equal protection analysis. The rationale for deeming aliens a discrete and insular minority is their "political powerlessness" (*Plyler*, 457 U.S. at 216 n.14), and nonimmigrant aliens are at least as politically powerless as immigrant aliens. In addition, aliens have historically been

subject to "institutionalized discrimination" in the form of state legislation "severely restricting [their] employment opportunities." Volker Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 Duke L.J. 871, 872. In particular, the "vast majority of states" at one time or another have "prevented noncitizens from practicing law" (*id.* at 883), restrictions that were equally applicable to immigrant and nonimmigrant aliens and that were struck down in *Griffiths*. Moreover, nonimmigrant aliens, like immigrant aliens, pay taxes and "contribute in myriad other ways to our society." *Griffiths*, 413 U.S. at 722; see App., *infra*, 37a. The Fifth Circuit's view that the "numerous variations" among nonimmigrant aliens prevent them from constituting a "discrete or insular" class (App., *infra*, 17a) misses the point. Petitioners do not contend that nonimmigrant aliens constitute a "discrete or insular" class but rather that they are part of the class of lawfully admitted aliens that this Court has consistently deemed discrete or insular and thereby subject to strict scrutiny. Furthermore, the status of *immigrant* aliens is marked by numerous variations as well.

Because the rational basis level of scrutiny applied by the court of appeals conflicts with this Court's precedents, the decision below should be reversed with instructions to apply strict scrutiny to § 3(B). The Louisiana rule cannot survive strict scrutiny. Whether or not commentators are right that "the Louisiana Supreme Court rule is motivated primarily by animus" (Kristin L. Beckman, Comment, *Banned from the Bar: Classification of the Temporary Alien in Louisiana*, 51 Loy. L. Rev. 139, 141 (2005)), and will exacerbate a severe shortage of indigent defense lawyers, especially in death penalty cases (Note, *Fifth Circuit Holds That Louisiana Can Prevent Non-Immigrant Aliens from Sitting for the Bar*, 119 Harv. L. Rev. 669, 669, 676 & n.63 (2005)), Louisiana has no compelling interest in forbidding the practice of law by nonimmigrant aliens that it cannot protect through less

restrictive means. See *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 283-287 (1985) (holding that state rule barring nonresidents from Bar admission violated Privileges and Immunities Clause and explaining that the state's asserted justifications were not "substantial" and could be protected "through less restrictive means"); *Griffiths*, 413 U.S. at 724 (rejecting notion that citizenship and alienage have any "relevance" to the "likelihood that a lawyer will fail to protect faithfully the interest of his clients").

A ban on the practice of law by all nonimmigrant aliens fails to appreciate that many nonimmigrant alien lawyers are quite capable of satisfying the state's legitimate interests in monitoring the legal profession, including protecting the stability of the attorney-client relationship. Unlike temporary visas issued to allow aliens to attend a conference or visit relatives, an H-1B visa is good for three years and may be extended for up to six years (8 C.F.R. § 214.2(h)(15)); holders of P-series visas may obtain extensions for up to ten years (*id.* § 214.2(p)(14)); and nonimmigrant holders of E-1 and E-2 visas may obtain an indefinite number of two-year extensions (*id.* § 214.2(e)(19),(20)). A nonimmigrant alien also may obtain permanent resident status under the "dual intent" doctrine (*id.* § 214.2(h)(16)) or by marrying a citizen or permanent resident alien (8 U.S.C. § 1153(a)). Griffiths, for instance, initially entered the U.S. on a non-permanent visa and became a permanent resident alien upon marrying a citizen *Griffiths*, 413 U.S. at 718 & n.1. A "case-by-case" inquiry (see *id.* at 725-727) is adequate to determine whether a particular nonimmigrant alien is unlikely to provide adequate and stable legal representation to clients.[6]

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[6]Even if the Court were to decide that rational basis is the proper level of scrutiny for alienage classifications directed to nonimmigrant aliens, it should hold that § 3(B) lacks a rational basis and therefore violates the Equal Protection Clause. There is no rational connection between the ability to function as an

B. The Fifth Circuit's Ruling Conflicts With This Court's Precedents Addressing Federal Preemption Of State Alienage Classifications.

Even if it could withstand equal protection analysis, § 3(B) would be preempted by federal immigration law. As Judge Higginbotham explained, another reason state alienage classifications should receive strict scrutiny is to ensure that they do not interfere with the supreme federal authority over immigration. App., *infra*, 87a-88a. Indeed, this Court has noted the view of commentators that "many of the Court's decisions concerning alienage classifications [are] better explained in pre-emption than in equal protection terms." *Toll*, 458 U.S. at 11 n.16.

The Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Toll*, 458 U.S. at 10; see also *Graham*, 403 U.S. at 365; *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). Exercising that authority, Congress enacted the INA as "a comprehensive and complete code covering all aspects of admission of aliens to this country." *Elkins*, 435 U.S. at 664. "The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *DeCanas* v. *Bica*, 424 U.S. 351, 359 (1976). Accordingly, there exist "substantial limitations upon the authority of the States in making classifications based upon alienage." *Toll*, 458 U.S. at 10. States "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturali-

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attorney and one's status as an immigrant as opposed to a nonimmigrant alien. As this Court explained when striking down Puerto Rico's restrictions on alien engineers, even "United States citizenship is not a guarantee that a civil engineer will continue to reside in Puerto Rico or even in the United States, and it bears no particular or rational relationship to skill, competence, or financial responsibility." *Flores de Otero*, 426 U.S. at 606.

zation and residence of aliens." *Takahashi*, 334 U.S. at 419; see *Graham*, 403 U.S. at 380 (state laws that denied welfare benefits to lawfully admitted aliens were "inconsistent with federal policy" and "encroach[ed] upon exclusive federal power").

The decision below conflicts with these principles and in particular with this Court's decision in *Toll*. That case concerned a State university program that allowed citizens and immigrant aliens to obtain preferential tuition treatment by showing they were domiciled within the state but did not allow nonimmigrant aliens domiciled within the state to obtain that benefit. The Court held that the state's imposition of "discriminatory tuition charges and fees solely on account of the federal immigration classification" was preempted by federal law. 458 U.S. at 17. Here, too, § 3(B) constitutes a discriminatory classification that operates "solely on account of the federal immigration classification." By upholding that classification, the Fifth Circuit departed from *Toll*.[7]

In other cases, too, the Court has closely scrutinized state alienage classifications to ensure that they do not interfere with federal immigration law and policy governing aliens lawfully in the U.S. See *Graham*, 403 U.S. at 378 (state law burdening lawfully admitted aliens preempted); *Takahashi*, 334 U.S. at 419 (same). In *DeCanas*, 424 U.S. at 355, the Court held that a state statute forbidding employers from knowingly employing an illegal alien was not preempted because it addressed only "aliens who have no federal right to employment within the country." The Court made clear

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[7] *Toll* addressed only holders of G-4 visas deemed domiciled in the U.S. by federal immigration law. The Court observed that "when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute." 458 U.S. at 13. There should be no such dispute here. Each petitioner held a visa authorizing residence in the United States for an extended period.

that, in contrast, state regulation that "discriminates against aliens *lawfully admitted* to the country is impermissible if it imposes additional burdens not contemplated by Congress." *Id.* at 358 n.6 (emphasis added). Section 3(B) indisputably is directed only at aliens lawfully admitted to the U.S. And whereas the statute in *DeCanas* sought "to protect the opportunities of lawfully admitted aliens" (*ibid.*), § 3(B) denies lawfully admitted aliens the opportunity to practice a profession for which they are otherwise qualified and therefore imposes "additional burdens not contemplated by Congress."

Louisiana's refusal to license lawfully admitted nonimmigrant aliens to practice law, based on a federal immigration classification that authorizes such aliens to live and work in this country, conflicts with the above precedents and with federal immigration law and policy. As the Court explained in *Takahashi*, 334 U.S. at 418-419, "[i]t does not follow [that] because the United States regulates immigration and naturalization in part on the basis of [certain] classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living."

The conflict between § 3(B) and federal immigration law is direct, not just a matter of abstract policy. For example, under federal law, an H-1B visa holder is admitted to this country to engage in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). A lawyer is such a "specialty occupation." 8 C.F.R. § 214.2(h)(4)(ii). Thus, federal law authorizes H-1B visa holders, such as petitioner Boulord, to work as lawyers, at the same time providing that they must obtain any state license required to practice that profession. 8 U.S.C. § 1184(i)(2)(A); 8 C.F.R. § 214.2(h)(4)(v). Louisiana's rule precludes nonimmigrant aliens from even seeking a state license and thereby conflicts with the predicate for this federal requirement—the assumption that

the states treat visa holders as at least *eligible* to obtain such licenses. Because § 3(B) "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" (*United States* v. *Locke*, 529 U.S. 89, 109 (2000)), it should be struck down pursuant to the Supremacy Clause.

Furthermore, denying qualified nonimmigrant aliens the right to practice their profession is "tantamount to the assertion of the right to deny them entrance and abode." *Truax*, 239 U.S. at 42; see also *Graham*, 403 U.S. at 380 (denying welfare benefits to noncitizens or conditioning them on longtime residency "equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode"). That remains the case even though § 3(B) does not preclude nonimmigrant alien lawyers from earning their living in some other way. If a state can forbid nonimmigrant alien lawyers from obtaining a license to practice law, it can forbid nonimmigrant aliens from obtaining licenses to engage in other lines of work as well. See *Truax*, 239 U.S. at 42-43 (sustaining restriction on alien employment would leave "no limit to the State's power of excluding aliens from employment").

The practical impact of the decision below is to force the departure of nonimmigrant alien lawyers desiring to practice law from Louisiana. "[T]hose lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." *Truax*, 239 U.S. at 42. Requiring nonimmigrant alien lawyers to either practice their profession outside Louisiana or not practice it at all cannot be reconciled with federal law, which does not limit the states in which a nonimmigrant alien may live and work. Such "auxiliary burdens" are "constitutionally impermissible" because they "encroach upon exclusive federal power." *Graham*, 403 U.S. at 379-380. This Court

should grant the petition to prevent states from encroaching on the federal authority to admit and regulate aliens.

III. THE RULING BELOW WILL CAUSE SERIOUS HARM UNLESS REVERSED.

As Judge Higginbotham recognized, the Fifth Circuit's ruling "shifts responsibility over aliens from the Congress to the States." App., *infra*, 88a. That shift results in "perverse" consequences. *Ibid.*

Of particular note, barring lawfully admitted nonimmigrant aliens from practicing law can only obstruct the growing transnational practice of law. Justice Rehnquist recognized over thirty years ago that a "large number of American nationals are admitted to the practice of law" abroad and that this number would "expand as world trade enlarges." *Griffiths*, 413 U.S. at 730 (Rehnquist, J., dissenting). Today, "[l]awyers performing international services routinely cross the lines between national legal systems." Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 Nw. J. Int'l L. & Bus. 487, 489 (2003). The United States exported $3.38 billion in legal services in 2003, while importing $879 million.[8] The integration of foreign lawyers into the fabric of increasingly global law firms "is made more difficult by restrictive rules of practice that complicate or limit the ability of firms to move lawyers among offices and nations to expose them to practice settings, core personnel and training experiences." Silver, *Regulatory Mismatch*, *supra*, at 489. Furthermore, "U.S. law schools increasingly look to foreign lawyers to fill their classrooms." Carole Silver, *Winners and Losers in the Globalization of Legal Services: Situating the*

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[8]United States Department of Commerce, Bureau of Economic Analysis, Table 1, Private Services Trade by Type, 1992-2003, cited in Laurel S. Terry, *Lawyers, GATS, and the WTO Accounting Disciplines*, 22 Penn. St. Int'l L. Rev. 695, 718 n.74 (2004).

Market for Foreign Lawyers, 45 Va. J. Int'l L. 897, 898 (2005). A JD degree from a U.S. law school will be much less attractive if nonimmigrant foreign nationals are forbidden to practice law in the U.S. upon graduation.

The Louisiana rule also is inconsistent with the goals of the General Agreement on Trade in Services ("GATS"),[9] a treaty to which the U.S. is bound as a member of the World Trade Organization. A primary goal of the GATS is to have member countries "accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service members." Art. XVII ¶ 1. Thus, the GATS aims to ensure that domestic licensing requirements are "not more burdensome than necessary to ensure the quality of the service" and "not in themselves a restriction on the supply of the service." *Id.* Art. VI ¶ 4. Specifically, the GATS aims "to encourage the United States and other members to liberalize prevailing rules to facilitate" authorization for "foreign lawyers to practice in the United States (and the other Member States)." Robert E. Lutz *et al.*, *Transnational Legal Practice Developments*, 39 Int'l Law. 619, 621 (2005). In light of the GATS, according to the U.S. Trade Representative, "[t]he United States is seeking broad removal of foreign barriers in sectors such as * * * legal services." Office of the U.S. Trade Representative, *Free Trade in Services: Opening Dynamic New Markets, Supporting Good Jobs* (May 31, 2005).[10] But "unless the United States can offer access to foreign lawyers, the USTR feels constrained from requesting such rights for U.S. lawyers abroad." Lutz, *supra*, at 624. The Louisiana rule

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[9]Available at http://www.wto.org/English/docs_e/legal_e/26-gats_01_e.htm.

[10]Available at http://www.ustr.gov/Document_Library/Fact_Sheets/2005/Free_Trade_in_Services_Opening_Dynamic_New_Markets,_Supporting_Good_Jobs.html.

represents a severe market access restriction at odds with the developing free global market in legal services.[11]

Moreover, the impact of the decision below will extend beyond the legal profession. The Fifth Circuit's reasoning would permit states to discriminate against nonimmigrant aliens when they confer benefits and impose burdens so long as they can articulate a mere rational basis for doing so. The ruling below thus opens the door for states to re-impose all the same discriminatory burdens previously struck down by this Court—provided that the discrimination affects only nonimmigrant aliens. Such discrimination not only would be inconsistent with equal protection principles but would represent a state-imposed reversal of federal immigration policy. It is no answer to say that, for now, this is the law only in the Fifth Circuit. The Fifth Circuit includes Texas, home to nearly 2 million lawfully present nonimmigrant aliens.[12] The harm already flowing from § 3(B) and sure to follow from the holding below should be confronted and stopped before it becomes irreparable.

The Court should be especially vigilant in today's political climate to ensure that nonimmigrant aliens, who are lawfully in this country but have no power at the ballot box, are not subject to invidious discrimination. Only a "strict scrutiny" test can separate legitimate restrictions from unjust

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[11]Such state restrictions are also likely to harm the interests of lawfully admitted aliens requiring legal representation. "Newly-arrived immigrants, faced with cultural and linguistic barriers, may find it especially helpful to retain an advocate who shares their ethnic heritage and has the ability to bridge the culture gap." Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 Seton Hall Const. L.J. 103, 131 (1996).

[12]See Office of Immigration Statistics, U.S. Dep't of Homeland Security, 2004 Yearbook of Immigration Statistics, p. 123 Table 28 (Jan. 2006), available at http://www.uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf.

discrimination. Moreover, since 9/11 Congress and the federal immigration agencies have deliberately addressed the standards for allowing aliens to enter the United States and remain here for certain periods. If it were ever permissible for individual states to intrude themselves into federal immigration policy, this would surely not be such a time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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